SUPREME COURT, U. S.
No. 73-271
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In the Supreme Court of the United States

OCTOBER TERM, 1973

RAUL JESUS ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the sufficiency of the evidence, the admissibility of certain physical evidence, and the court's procedure in permitting a law clerk to read the court's instructions to the jury.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess and distribute heroin and cocaine in violation of 21 U.S.C. 841(a) and 846. He was sentenced to five years' imprisonment with immediate eligibility for parole under 18 U.S.C. 4208(a)(2). The court of appeals affirmed, and a petition for rehearing was denied on May 17, 1973 (Pet. App.). The petition for a writ of certiorari was not filed until August 1, 1973, and is therefore substantially out of time under Rule 22(2) of this Court's Rules. In any event, there is no occasion for further review.

The evidence showed that a government informer, Manuel Rodriguez, met with Rene Vandenades in November 1971. The latter offered Rodriguez $2,000 to deliver a package to petitioner in Chicago (Tr. 33).[1] On December 14, following a conversation with Vandenades's wife, Manuel Rodriguez went to Florida, accompanied by an agent of the Bureau of Narcotics and Dangerous Drugs (Tr. 34). Rodriguez met Vandenades, and they joined petitioner at a restaurant (Tr. 25). Petitioner told Vandenades to meet him later at the beach, rather than at Vandenades's garage, since Vandenades was "very hot." Rodriguez and Vandenades planned to meet at a supermarket afterward (Tr. 26-27).

Rodriguez met petitioner at the supermarket that evening, and petitioner said that Vandenades was very "hot," that the "connection" was frightened, and that the connection was reluctant to give anything to Vandenades (Tr. 27, 45, 50). Rodriguez complained that he had come to Miami to get a package or money, and that he was eager to return to Chicago (Tr. 46, 50). Petitioner replied, "Don't blame these people because they don't want to lose four or five kilos. It is a lot of money" (Tr. 50-51). After Vandenades arrived, petitioner instructed Rodriguez to rent an automobile and meet him early the following morning, so that they could travel together to Chicago (Tr. 28).

Petitioner failed to keep the appointment, and Rodriguez went to see Vandenades. The latter said he would try to make contact with petitioner, and directed Rodriguez to be at the supermarket again that evening. Rodriguez kept the appointment and met petitioner,

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[1] "Tr." refers to the trial transcript, included in the Appendix filed in the court of appeals. It is paginated in the copy as (T-33), etc. We are lodging a copy with the Clerk of this Court.

who explained that he had failed to meet Rodriguez earlier because the connection was still afraid, and that petitioner had been unable to obtain anything from him (Tr. 29). Petitioner told Rodriguez to have Vandenades contact petitioner, so that together they might see the connection and persuade him to give them the "thing" (Tr. 30).

On the following day, Rodriguez saw Vandenades and said he would wait no longer and was returning to Chicago (Tr. 32). Three weeks later, after a telephone call from Vandenades, Rodriguez returned to Miami with two federal agents and met Vandenades at the garage (Tr. 35). Vandenades told Rodriguez of a change in plans: Rodriguez was to deliver one package to New York, return to Miami for a second package, and deliver it to Chicago (Tr. 36). Vandenades said that he would locate petitioner, and that Rodriguez should wait for the connection and the "merchandise." As soon as he got the "merchandise," Rodriguez could go to Chicago, and petitioner would take care of him (Tr. 39-40).

The following morning, Rodriguez, Vandenades, and Marta Rodriguez (Vandenades's wife) met and drove to a gasoline station and parked next to an Oldsmobile. Vandenades removed two packages from the Oldsmobile and returned to the other car, telling Rodriguez to drive around while he wrapped the packages. They returned to the service station, and Marta Rodriguez returned one package to the Oldsmobile (Tr. 41-44). The packages were subsequently seized by BNDD agents and found to contain eleven pounds of heroin and six pounds of cocaine. They were admitted in evidence over objection (Tr. 44, 61-62, 93-94).

1. Petitioner contends that the government's evidence was insufficient to connect petitioner with the conspiracy

alleged in the indictment. Petitioner does not deny that the government proved the existence of a conspiracy, although he challenges the sufficiency of the evidence to prove his participation in the scheme. It is settled, however, that once the conspiracy is shown, only slight evidence is required to link a particular defendant to the plan. *United States* v. *Pardo-Bolland,* 348 F. 2d 316, 325 (C.A. 2), certiorari denied, 382 U.S. 944; *United States* v. *Kenny,* 462 F. 2d 1205, 1226 (C.A. 3), certiorari denied *sub nom. Kunz* v. *United States,* 409 U.S. 914; *United States* v. *Iacovetti,* 466 F. 2d 1147, 1154 (C.A. 5), certiorari denied, 410 U.S. 908; *United States* v. *Hoffa,* 349 F. 2d 20, 46 (C.A. 6), affirmed, 385 U.S. 293; *United States* v. *Henderson,* 446 F. 2d 960, 965 (C.A. 8), certiorari denied, 404 U.S. 991; *Diaz-Rosendo* v. *United States,* 357 F. 2d 124, 130 (C.A. 9), certiorari denied, 385 U.S. 856. The evidence in the instant case was ample to establish that petitioner was intimately involved in the scheme to obtain and distribute illegal drugs.

With the government informant and another conspirator, petitioner attended several meetings, which were alleged as overt acts in furtherance of the conspiracy (Tr. 25, 27, 29).[2] When the informant expressed disgust with the delay in securing a "package," petitioner dissuaded him from returning to Chicago immediately (Tr. 46, 50-51). Petitioner instructed the informant to rent a car so that they could travel to Chicago together (Tr. 28). When petitioner failed to keep his appointment to begin the trip, he explained that it was because his "connection" was afraid and refused to give him the "thing" (Tr. 29-30). Petitioner's conversation contained repeated references to "kilos" and to a "connection" who was reluctant to supply him with anything because Vandenades was "hot." Viewed most favorably to the government, this evidence

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[2] Petitioner admitted being present at these meetings (Tr. 58-59).

supports the jury's verdict that petitioner participated in a conspiracy to acquire and distribute narcotics. *Glasser* v. *United States,* 315 U.S. 60, 80.[3]

2. Petitioner also contends that the narcotics which were seized from conspirators Vandenades and Marta Rodriguez were improperly admitted into evidence, since, in petitioner's view, the government failed to establish petitioner's responsibility for possession of the drugs. It is not necessary, however, to prove that all of the co-conspirators participated in each overt act. One who commits any overt act with knowledge of the conspiracy is liable for the acts of his coconspirators, even if he is absent when a substantive crime is committed. *Poliafico* v. *United States,* 237 F. 2d 97, 103-104 (C.A. 6), certiorari denied, 352 U.S. 1025.[4] This is true even if the accused is unaware of a specific transaction, as long as the act is within the scope of the original plan. To avoid liability for a subsequent act of his co-conspirators, the accused must show affirmatively his withdrawal from the scheme. *United States* v. *Cirillo,* 468 F. 2d 1233, 1239-1240 (C.A. 2), certiorari denied, 410 U.S. 989. In the instant case, petitioner concedes that he did nothing to repudiate the plan (Pet. 12).

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[3] The cases with which petitioner contends the present case conflicts (Pet. 13), stand merely for the point that one may not be convicted of conspiracy solely upon evidence of association with conspirators. The evidence in the instant case, however, shows petitioner's personal participation in the scheme, and the jury was instructed that conviction must not be based on mere association (Tr. 134).

[4] Petitioner errs in reliance (Pet. 10) upon *Evans* v. *United States,* 257 F. 2d 121 (C.A. 9), certiorari denied, 358 U.S. 866. There, the government failed to prove any conspiracy. Consequently, the complaining defendant could not be bound by the act of an alleged coconspirator.

As petitioner notes (Pet. 11), the admission of physical evidence is within the discretion of the trial court. The scope of this discretion, moreover, is particularly broad in a conspiracy case. *United States* v. *Skillman*, 442 F. 2d 542, 551-552 (C.A. 8), certiorari denied, 404 U.S. 833. The discretion is not abused by admission of relevant evidence relating to a coconspirator. "Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to be linked by quite separate proof." *United States* v. *Costello*, 352 F. 2d 848, 854 (C.A. 2), reversed on other grounds *sub nom. Marchetti* v. *United States*, 390 U.S. 39.[5]

3. Petitioner contends that the trial court committed reversible error in permitting the instructions to be read to the jury by a law clerk. While we do not question that the better practice is for the judge to deliver the charge himself, in the circumstances of the instant case, the procedure followed was not error, much less reversible error.

Following arguments of counsel, the court advised the jury, "it is my duty to instruct you as to the law that you are to apply to the evidence in arriving at your decision. You may have noticed that the Judge is getting a little old and his eyes are not as bright as they used to be; so I am going to have my Clerk read the instructions which we have prepared which, of course, is the law in this case" (Tr. 126-127). The court then directed the clerk to read the instructions, and after this was done,

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[5] In any event, the boxes containing the physical evidence were shown only briefly to the jurors, who were later advised of a stipulation that the boxes contained eleven pounds of heroin and six pounds of cocaine (Tr. 21-23, 93-94). In these circumstances, the presentation of the evidence was neither inflammatory nor prejudicial.

stated, "Now, you have heard the instructions read and I assume there are no differences." No objections were made. The record does not indicate that the judge was absent from the bench during any part of the delivery of the charge; the contrary would appear to be the case (Tr. 127, 142).

Under Rule 30 of the Federal Rules of Criminal Procedure, petitioner waived his right to object to the instructions by failing to do so before the jury retired to deliberate. Cf. *United States* v. *Kurfess*, 426 F. 2d 1017, 1020 (C.A. 7), certiorari denied, 400 U.S. 830; *United States* v. *Mancuso*, 423 F. 2d 23, 29 (C.A. 5), certiorari denied, 400 U.S. 839. See also *Lopez* v. *United States*, 373 U.S. 427, 436.

In any event, petitioner neither alleges nor shows any prejudice resulting from the procedure followed by the court in the instant case. It is not contended that the instructions themselves were prejudicial or erroneous or that they failed to state the applicable law, or that the jury failed to follow them. Petitioner's only argument in support of his position is that "the respect which is due to the Judge * * * does not inure to the Judge's clerk" (Pet. 14). Here, however, the judge made it clear that it was his duty to instruct the panel, that the instructions read by the clerk comprised the charge of the court and the applicable law, and that only physical infirmity prevented him from delivering the charge personally. In these circumstances, there is no reason to believe that the jury did not accord the proper respect to the instructions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.